

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MICHAEL ARAGON</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,409
<b>PANHANDLE EASTERN PIPELINE COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>HARTFORD ACCIDENT &amp; INDEMNITY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and its insurance carrier requested review of the preliminary hearing Order for Medical Treatment dated November 5, 1998, entered by Administrative Law Judge Pamela J. Fuller.

**ISSUES**

In their Application for Review by Workers' Compensation Appeals Board the respondent and its insurance carrier state the issues as:

- "A. Whether or not the claimant met with personal injury [or occupational disease] that arose out of and in the course of his employment.
- "B. Whether or not the respondent and its insurance carrier should be liable for payment of medical bills incurred, prescriptions previously billed and medical treatment."

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Claimant has worked for respondent for almost 25 years. On May 26, 27 and 28, 1998, claimant was working with what he described as "hazardous waste" getting it ready for disposal. This involved removing the sludge that had settled to the bottom of a holding tank and transferring it into barrels. Claimant described the contents of the tank as a

combination of chemical and petroleum products, including various solvents and paint thinners. The material safety data sheet for several of the chemical products that went into the storage tank were introduced into evidence.

Claimant testified that after the contents of the barrels were given time to settle, the liquid at the top was drained off leaving only the sludge and solids in the barrels. The remaining contents of the partially full barrels were then combined to make full barrels. This was done to reduce the cost of disposal. The barrels were then labeled hazardous waste.

Claimant's problems began the evening of the 27th after he went home. His chest was hurting, his throat was raw and he had a headache. At first claimant thought he was perhaps catching a cold. The next day he returned to work and was assigned the task of combining the remaining sludge from one barrel into another in order to make a full barrel. After about 45 minutes, claimant started getting a headache and feeling dizzy. This is the last thing he remembers before coming to in the hospital.

Claimant testified he used a shovel to scrape the sludge out of one barrel into another and had to almost get his head into the barrel. He was not given a respirator or other protective equipment or clothing other than gloves. In addition to the barrels, claimant testified there were also fumes coming from the storage area about 10 feet away where the HV-1 was stored in an open vat. He described the HV-1 as caustic soda that was agitated by air and thus fumes or vapors were constantly coming out of it. This product is kept at a high temperature of about 150 to 190 degrees. Claimant testified the vapor is like steam and it could be seen blowing in his direction while he was working.

Darrell Salley, claimant's co-worker, also testified. Mr. Salley said that just before claimant's incident he had needed to take a break because his stomach was getting upset. Then claimant called to him saying that he was getting dizzy. He helped claimant to lie down on the ground and put rags under his head. Claimant "swelled up like popcorn, turning a yellowish color, and it was hard to breath. As I was watching him, he stopped breathing for a few minutes, and all of a sudden a gas [sic] of air came out of his lungs, and he started breathing on his own . . . ." When the paramedics arrived they asked if this was chemical related and the supervisor told them it was just waste oil. Mr. Salley admitted during his testimony, however, that there was more than waste oil in the vats and barrels. The following week cleaning crews were brought in wearing air packs and protective clothing to finish cleaning out the storage tank.

When claimant woke up in the hospital he had pain in his shoulders. This shoulder pain was new and he had not had it before the incident at work. Claimant's treating physician, Dr. Jan Goossens, referred him to an orthopedic surgeon, Dr. Marc-Andre Bergeron. After a trial period of physical therapy an MRI was performed and surgery recommended.

Dr. Goossens advised claimant that he was suffering from a seizure disorder related to his exposure to chemicals at work. Claimant denies being epileptic or ever being diagnosed as having epilepsy. When he was a child of about 12 years old he fainted in church but did not receive any medical treatment because of that incident. He was never put on any seizure medication.

Before the May 28, 1998 incident at work, claimant was taking a prescription medication called Questran powder for his digestive system as a result of having had his gall bladder removed. The night before this incident claimant took Tylenol and Penicillin from an old prescription. Also, twenty days before he had a medical procedure performed to repair a hole in his eardrum.

Respondent introduced as an exhibit to the preliminary hearing record a report by Curtis D. Klaassen, Ph.D., of the University of Kansas Medical Center, Department of Pharmacology, Toxicology and Therapeutics. Respondent also introduced a laboratory report concerning some of the chemicals that claimant had been exposed to. Dr. Klaassen's report was based upon that independent laboratory's analysis of the sludge claimant was working with. The record does not disclose, however, what methods the laboratory followed or whether it was asked to consider all the chemicals claimant testified he was exposed to at work. Dr. Klaassen's opinions were based upon the assumption that the laboratory report was inclusive of all the chemicals claimant was exposed to.

Mr. Ken Gray testified he is employed by respondent and that he ordered the laboratory report. He confirmed that the test sample came from the barrels claimant was handling. He could not testify as to what chemicals were tested for or what instructions were given to the laboratory. He did not know whether the laboratory only tested for the chemicals that it was directed to test for or if it would test for other chemicals as well. That was handled by a different department. The purpose of the lab test, however, was to ascertain what materials were within the barrels in order to know how to dispose of the material. He also acknowledged that a week after claimant's incident a clean-up crew came in wearing protective equipment including full respirator gear and "moon suits." He acknowledged that claimant did not have that safety equipment available to him when he was working with the materials.

Respondent contends claimant has failed to meet his burden of proof because the medical opinion relating claimant's injury to work only states that the chemical exposure was a likely cause rather than it being more probable than not. It could be significant that the report by Dr. Goossens has the word "probably" crossed out and "likely" written above. Generally these two words would be considered synonymous but the Appeals Board agrees with respondent's counsel that the change implies that the terms are not synonymous to Dr. Goossens. Nevertheless, the common meaning given to the word "likely" is the same as "more probable than not" and, absent some explanation from Dr. Goossens indicating a contrary meaning was intended, that is the meaning that it will be given.

Respondent next argues that the toxicologist rules out the sludge as a cause for a seizure. It is not clear, however, that what claimant suffered was in fact a seizure. The eye witness testimony by Darrell Salley was that claimant said he felt dizzy, he was assisted in lying down, whereupon claimant experienced a sudden onset of swelling, an inability to breath, and a loss of consciousness. The inability to breath could be explained by the swelling. It does not appear that either Dr. Goossens or Dr. Kharidi had this history or that the emergency personnel were given this explanation of the sequence of events. Dr. Goossens' diagnosis was based upon his being given a history of claimant having a seizure. Likewise, Dr. Klaassen's report does not address the possibility of an allergic reaction to some chemical present in the sludge, which could even be a chemical determined to be within acceptable limits of concentration for generally safe handling. Although Dr. Goossens' opinion that the illness or injury was likely related to the chemical exposure at work is somewhat suspect based upon his diagnosis of a seizure in light of Dr. Klaassen's opinion that the chemicals in the laboratory analysis could not cause a seizure, the possibility of an asthmatic event or allergic reaction has not been ruled out. Furthermore, Dr. Goossens' opinion cannot be said to be entirely refuted by the toxicology report because of Dr. Klaassen's reliance upon what appears to be an incomplete laboratory analysis.

The record contains two opinions relating claimant's injury to his work. The July 7, 1998 Note to Employer by Jan Goossens, M.D., who is board certified in internal medicine, reads "nature of illness or illness seizure disorder likely related to chemicals at work" and his July 7, 1998 letter to Dr. Kharidi reads "As you know this gentleman had a seizure after being exposed to some chemicals at work. Your feeling was that this was likely the cause for his seizures." The report of neurologist Dr. Viswanatha Kharidi says "We have not found any reason for his seizures except for chemical exposure, therefore it is likely that this may be an etiological factor in his seizure disorder." Also, the note from Dr. Pamela Robbins states "Mr. Aragon had a left tympanoplasty 5/8/98, he had a seizure 20 days later, I know of no correlation between tympanoplasty and a seizure 20 days later."

To refute claimant's medical evidence, respondent offered the opinion of Dr. Klaassen. Based upon the laboratory report, Dr. Klaassen opined that claimant's seizure was not due to exposure to chemicals because the predominant chemical claimant was exposed to was toluene and toluene is a safe chemical. Although at high exposure it can produce sedation that is a slowing down of the brain, what claimant apparently had was a convulsion which is an increased firing of the brain.

This is an extremely close case. The determination of whether claimant's condition is work related is made all the more difficult by the questions surrounding the history given to the medical experts upon which they based their diagnoses or assumptions that claimant suffered a seizure. Nevertheless, based upon the sequence of events described by claimant and his co-worker Mr. Salley, together with the medical evidence and expert opinions currently in the record, the Appeals Board finds that claimant has met his burden

of proof. The greater weight of the evidence supports a finding that claimant's condition is work related.

The Appeals Board finds claimant suffered injury by accident that arose out of and in the course of his employment. Respondent denied claimant's workers compensation claim and refused to provide medical treatment. Accordingly, the ALJ did not exceed her jurisdiction in ordering the unauthorized medical treatment paid as authorized medical.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order for Medical Treatment dated November 5, 1998, entered by Administrative Law Judge Pamela J. Fuller should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Kirby A. Vernon, Wichita, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director